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No. 574

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IN THE

Supreme Court of the United States

MODERN LIFE INSURANCE COMPANY,

Appellant,

—v.—

BERNARD N. WOLFMAN,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The appellant, pursuant to United States Supreme Court Rules 13 and 15, submits this statement to show that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question and should exercise such jurisdiction.

Opinion Below

The opinion of the Supreme Judicial Court is reported as *Wolfman* v. *Modern Life Insurance Co.*, 1967 Mass. Advance Sheets 637, 225 N.E.2d 598 (1967) and is printed in the appendix hereto. (Pp. 1a-13a *infra*). The Superior Court filed no opinion. Its Findings and Rulings are printed in the appendix. (Pp. 13a-14a *infra*).

Jurisdiction

(i) Appellee, as assignee of a life insurance policy issued by appellant, brought an action to recover the proceeds of the policy in the Superior Court of Suffolk County, Massachusetts, under Section 2 of the Massachusetts Unauthorized Insurers' Process Act, G. L. c. 175B.

In a special appearance, appellant contested the Superior Court's jurisdiction over appellant. The Court overruled appellant's plea to the jurisdiction but thought that the propriety of its ruling ought to be determined by the Supreme Judicial Court and therefore reported the case to that Court.

The Supreme Judicial Court held that appellant's activities were within the compass of G. L. c. 175B and that the statute as thus applied to appellant was not repugnant to the Constitution of the United States.

(ii) The judgment of the Supreme Judicial Court affirming the decision of the Superior Court overruling the plea in abatement was dated April 7, 1967, and was entered on April 7, 1967. No application for rehearing was made. The notice of appeal to this Court was filed on July 6, 1967 in the Suffolk County Superior Court.

(iii) Jurisdiction of the appeal is conferred upon this Court by 28 U.S.C. § 1257(2).

(iv) The following authority, among others, sustains the jurisdiction of this Court in cases where, as in the instant case, a state court has affirmed the applicability of a state enactment to appellant's circumstances and has held the statute valid under the United States Constitution as thus applied:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 (1921).

The following authorities sustain the proposition that this was a final judgment within the meaning of 28 U.S.C. § 1257(2):

Rosenblatt v. *American Cyanamid Co.*, 86 S. Ct. 1 (1965);
Mercantile National Bank v. *Langdeau*, 371 U. S. 555 (1963);
Local No. 438 v. *Curry*, 371 U. S. 542 (1963).

(v) The statute involved, Section 2 of G. L. c. 175B, provides as follows:

"Any of the following acts in this commonwealth, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this commonwealth or to corporations authorized to do business therein; (2) the solicitation of applications for such contracts; (3) the collection of premiums, membership fees, assessments or other considerations for such contracts; or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this commonwealth upon such insurer."

Question Presented

Are traditional notions of fair play and substantial justice offended when a state, by an act of its legislature, permits its courts to assume personal jurisdiction over a foreign life insurance company not authorized to do, nor doing, business in the state in an action brought by a resident assignee of a policy issued by the company to recover the proceeds of the policy, where:

(1) the insured, who was not a resident of the forum state, applied for the policy and underwent a physical examination in the insurer's home state, received the policy there, obtained the assignment form and a form of application for reduction of the face amount of the policy there, and only then went into the forum state, where he assigned the policy to secure a loan;

and where

(2) the only dealings, apart from premium payments, between the insurer and the assignee were the mailing of the executed forms by the assignee to the insurer, who returned them to the assignee, and a series of communications, initiated by the assignee, during which the mechanics of the assignment, the reduction of the face amount of the policy and the method of premium payment were discussed?

Statement of the Case

Defendant, Modern Life Insurance Company, is a New York corporation. (Op., p. 1a *infra*). Its office is located in the City of New York. (Op., p. 2a *infra*). It has never done business in Massachusetts and is not authorized to do business there. (Op., p. 5a *infra*; Exh. "2", p. 1).

On March 18, 1964, John Stricker, a Maryland resident, submitted an application for a $50,000 policy to defendant at its home office in New York City through an insurance broker there. (Op., p. 2a *infra*). Stricker underwent a medical examination in New York City. (*Ibid.*). He represented in his application that he did not use alcoholic stimulants to excess, did not suffer from any of the medical conditions set forth in the application and had not been examined or treated by a physician during the preceding five years. (Exh. "2", p. 2).

The policy (Modern Life Insurance Company Policy #1942) was delivered to the insured by defendant in New York City through the same broker on or about March 21, 1964. (Op. p. 2a *infra;* Exh. "2", p. 3). The date of issue appearing on the face of the policy was March 20, 1964. (Exh. "2", p. 3). Shortly thereafter the insured, through the same broker, asked defendant for a form of application for reduction of the face amount of the policy and an assignment form. (Op., p. 2a *infra*). They were delivered to him in New York City. (*Ibid.*).

On March 26, 1964, plaintiff, Bernard N. Wolfman, called defendant from his office in Boston, Massachusetts. (*Ibid.*). He explained to defendant's registrar, Albert A. Sterlini, that he was going to take an absolute assignment of the policy and inquired as to the number of the policy to be inserted in the assignment form. (*Ibid.*). He asked that the policy be sent to him at his office address in Boston. (*Id.*, p. 3a *infra*). He was advised by Sterlini that the executed forms should be sent to defendant and that the policy number to be inserted in the assignment was 1942. (*Id.*, pp. 2a-3a *infra*). Finally, he asked Sterlini to find out for him what the amount of the quarterly premium would be. (*Id.*, p. 3a *infra*). Plaintiff called back later that same day. (*Ibid.*). Sterlini then told him that the quarterly premium would be $321.41. (*Ibid.*).

Plaintiff mailed the request for reduction of the amount of the policy and the assignment form, both executed by the insured, to defendant on March 26, 1964. (*Ibid.*). He enclosed the policy as originally issued in the face amount of $50,000 and a check in the amount of $321.41, the amount of the quarterly premium on the policy as reduced to $35,000. (*Ibid.*). In his covering letter (Exh. "6") he stated that he understood that the amended policy would be mailed to him. (*Ibid.*). He testified that he received the amended policy in the mail on March 27 or 28, 1964. (Tr., p. 26). Sterlini testified that he sent the policy, not to Wolfman, but to the New York agent (*id.*, p. 12), and he offered to testify that the agent delivered the policy to the insured in New York (Exh. "2", para. 4). On objection by plaintiff's counsel, the latter part of his testimony was stricken. (Tr., p. 8). Although plaintiff (who had the burden of proof on the issue) reverted to the matter several times, he never identified the sender of the policy and produced neither covering letter nor envelope. He testified that the assignment form was returned to him but admitted that the policy arrived in a different envelope. (Tr., p. 27).

There were no other communications from defendant to plaintiff except two letters about premium payments, and both of those were sent in response to inquiries by defendant. (Op., pp. 3a-4a *infra*).

The insured died on February 10, 1965. (Exh. "J" to Exh. "2"). On the death certificate, the cause of his death was given as: fatty liver, gastro-intestinal hemorrhage, ethanolism. (*Ibid.*). Investigations made on defendant's behalf disclosed that when insured applied for the policy, he had, although denying it in his application, been treated for acute gastritis, hepatitis, pulmonary emphysema and

chronic alcoholism. (Exh. "2", p. 4). Consequently, defendant refused to pay the proceeds of the policy. (*Ibid*).

Plaintiff instituted the instant action to recover the proceeds of the policy on July 6, 1965. Defendant interposed a plea in abatement, claiming that the court did not have personal jurisdiction of defendant, a foreign corporation not licensed to do or doing any business in Massachusetts. Defendant contended that (a) the Massachusetts statute did not purport to confer jurisdiction on facts such as these and (b) if it did, it would, to that extent, be void as violative of due process, guaranteed to defendant by the Fourteenth Amendment, citing *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957), and *Hanson* v. *Denckla*, 357 U. S. 235 (1958). (Defendant's Requests for Rulings; Tr., pp. 30-33).

A hearing was had on the plea in the Superior Court before Judge Kalus on October 20 and 21, 1965. On October 26, 1965, the judge overruled the plea, but he referred his decision to the Supreme Judicial Court for its determination of the propriety of his findings and rulings. Judge Kalus' report reads as follows:

> "This cause came on to be heard before me on defendant's Answer in Abatement and Plea to the Jurisdiction, which I overruled on October 26, 1965.
>
> Being of opinion that the propriety of my Findings and Rulings overruling said Answer in Abatement and Plea to the Jurisdiction ought to be determined by the Full Court before any further proceedings be had, I hereby report this case to the Full Court for its determination on plaintiff's Declaration, defendant's Answer in Abatement and Plea to the Jurisdiction, the evidence taken, plaintiff's Requests for Rulings of Law, defendant's Requests for Rulings, and my aforementioned Findings and Rulings.

All further proceedings in this Court, except such as are necessary to preserve the rights of the parties, are hereby stayed.

HARRY KALUS
Justice of the Superior Court

Entered: November 23, 1965."

In its brief in the Supreme Judicial Court, and again upon the argument, defendant renewed its contention that, if the statute were construed to confer jurisdiction on the facts here presented, it would be void as repugnant to the Fourteenth Amendment.

The Supreme Judicial Court affirmed the judgment of the Superior Court in a decision filed on April 7, 1967. (Pp. 1a-13a, *infra*). The Court's decision of the federal question is prefaced "The Requirements of Due Process". (Pp. 9a-13a, *infra*). On that issue the Court concluded:

> "We recognize that no activity of Modern Life induced Wolfman to acquire his interest in the insurance contract. But he acquired an enforceable right under the policy only because of and in the course of business dealings in Massachusetts. Modern Life took its part in those dealings to serve its own interest in conducting its business appropriately and conveniently for those concerned with its product. This met the test of voluntary, purposeful activity, and to the extent that the test of inconvenience is applicable, such inconvenience as is suggested does not make it unfair to rule that G. L. c. 175B as applied to Modern Life on the facts is constitutional. We rule that it is."
> (*Infra*, p. 12a).

The Question Presented Is Substantial

Since this Court's decision in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), the test for compatibility with the Due Process Clause of a state enactment conferring personal jurisdiction on its courts over a foreign corporation not otherwise amenable to suit in that state is whether the corporation has exercised the privilege of conducting activities within that state and has incurred obligations arising out of or connected with those activities. 326 U. S. at 319. If so, a procedure which requires the corporation to respond to a suit brought to enforce those obligations will, in most instances, not be considered to be undue. *Id.* at 319. The activities must be such as to establish sufficient contacts or ties with the forum state to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which the corporation has incurred there. *Id.* at 320.

This Court subsequently held, in *McGee* v. *International Life Insurance Co.,* 355 U. S. 220 (1957), that a life insurance company may be subjected to suit in the state of residence of its insured where the insurance contract was solicited and delivered there, albeit by mail, the premium payments were mailed from there and the insured died there.

McGee represents the limit to which this Court has gone. In *Hanson* v. *Denckla,* 357 U. S. 235 (1958), the Court, responding to an argument based on *McGee,* warned that "* * * it is a mistake to assume that this trend [of expanding personal jurisdiction over non-residents] heralds the eventual demise of all restrictions on the per-

sonal jurisdiction of state courts." 357 U. S. at 251. (citation omitted). The Court continued:

> "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319." 357 U. S. at 251.

The Court distinguished *Hanson* from *McGee* by the fact, among others, that in *Hanson* (as in the case at bar), there was no solicitation of business in the forum state, either in person or, as in *McGee*, by mail. *Id.* at 251. The exercise of jurisdiction in Mrs. McGee's action was justified by the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that state. *Id.* at 252.

Whatever the ultimate limit of the *International Shoe* doctrine as applied to foreign insurers is thought to be, it has never been doubted, as far as we are aware, that where the policy is issued to the insured in one state and the insured thereafter takes up residence in another state, his residence in the latter state does not justify the exercise of personal jurisdiction by the courts of that state over the insurer in an action on the policy. The insured cannot expand the jurisdiction to which the insurer is subject by removing himself and the policy to another state. It will not do to say that the company must reasonably foresee that its insured may move to any

one of the fifty states and that therefore a contact of sorts may be established by the insurer with that state, for it is not on such contacts that jurisdiction is founded. The contacts which justify assumption of jurisdiction over a foreign insurer not otherwise amenable to suit are those created by its exercise of the privilege of conducting business activities within the state, *International Shoe Co.* v. *Washington, supra,* not those created by the exercise by the insured of his right of locomotion. In the words of the District Court in *Southern Machine Company, Inc.* v. *Mohasco Industries, Inc.*, 263 F. Supp. 164 (E. D. Tenn. 1967):

> "* * * Of course, any unilateral action by the plaintiff cannot satisfy the requirement of contact with the forum state. Hanson v. Denckla, supra." 263 F. Supp. at 167.

If the insured, having obtained insurance in one state, cannot create jurisdiction over the insurer in another state by removing himself and the contract to that state, *a fortiori,* he cannot create jurisdiction in the other state by removing the contract, alone, to that state, as by assignment. But that is precisely the effect of the ruling made by the state courts in the instant case.

The Massachusetts courts fastened upon plaintiff's testimony that he had received the policy in the mail and held that defendant delivered the policy to plaintiff, the assignee, in Boston. (Op., pp. 6a-7a *infra*). That finding, we respectfully submit, is not supported by evidence in the record. This Court must in proper cases review the evidence to determine whether the record constitutionally supports the judgment rendered. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, at 285 (1964). Defendant's registrar testified that he sent the policy to the broker in New York, and he offered to prove that the agent delivered the policy to the

insured in New York. (Tr., p. 12; Exh. "2", p. 3). Plaintiff, who had the burden of proof on the issue, *Smeltzer* v. *Deere and Co.*, 252 F. Supp. 552 (W.D. Pa. 1966); see *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269 (1936), testified that defendant had promised to send the policy to him, but he did not say from whom he received the policy. Moreover, the Court's finding that delivery took place in Massachusetts, even though the policy may have been mailed by defendant to the New York agent and by him to plaintiff (Op., p. 7a, *infra*), is not supported by the law of New York, the law upon which the Supreme Judicial Court purported to rely. (*Ibid.*). Under New York law, delivery by an insurer of a policy to an agent of the insurer after the first premium has been paid and the application approved constitutes delivery to the insured. *Jones* v. *Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y.S. 4, at 7-8 (App. Term, 1st Dept. 1936). It follows that such delivery of the policy to the agent constitutes delivery to anyone, such as an assignee, to whom the insured had relinquished his right to the policy. Inasmuch as plaintiff had forwarded the first premium to defendant with his letter of March 26, 1964, defendant's subsequent mailing of the policy to its agent was effective delivery of the policy to plaintiff in New York.

Even if there had been convincing proof that defendant had delivered the policy in Massachusetts and, even if the governing law had supported the finding of a delivery there, no basis for the exercise of jurisdiction over defendant would have been established thereby, for defendant would have made such delivery, not for the purpose of exercising the privilege of doing business in Massachusetts, but for the purpose of carrying out the instructions of its insured, who had the right to assign the policy to whomever he liked in whatever state he should choose.

This is a far cry from the solicitation of insurance business in California by International Life Insurance Company of Texas which provided the basis for the exercise of jurisdiction in *McGee*. The facts in the instant case are much more like those presented in *Hanson*, where it was shown that the trust agreement in suit had been executed in Delaware by a Pennsylvania resident and that the settlor later moved to Florida. There were subsequent dealings between the settlor in Florida and the trustee in Delaware, as there were between plaintiff in Massachusetts and defendant in New York in the case at Bar, but this Court refused to allow Florida to exercise personal jurisdiction over the trustees. The Court distinguished *McGee*, not only by the fact that the insurance business is one affected with a special public interest, but *also* by the facts that:

> "• • • The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*. But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319."
>
> 357 U. S. at 252. (Footnotes omitted).

The Supreme Judicial Court was led to the conclusion that due process was afforded in the case at Bar by the following reasoning:

> "We think, however, that acts other than selling a policy may be voluntary business activity within the rule. Wolfman suggests that Modern Life could have declined to deal at all with Wolfman in Massachusetts. We agree with Modern Life that this would not have been a reasonable way to conduct its business. But this is so because it was doing business in the United States, across State lines, and to require that persons dealing with it come to New York would have adversely affected that business. Modern Life dealt with Wolfman in the way it did because of the way it chose to do business generally. We rule that this was 'purposefully . . . [availing] itself of the privilege of conducting activities within the forum State.'" (*Infra*, pp. 11a-12a).

Defendant will argue on this appeal that if the court's reasoning were adopted, it would lead to nothing less than the complete abandonment of the territorial restrictions upon the power of the states to exercise judicial jurisdiction over foreign corporations. To say that, if a corporation does business *generally* across states lines, it may be subjected to jurisdiction in any State where an assignee of a cause of action against it happens to reside, at least if it recognizes his rights as assignee, is to do away entirely with the conduct-of-activities theory, the very thing against which this Court warned in *Hanson* v. *Denckla*, *supra*. Although the door of non-resident jurisdiction has been opened wider by *International Shoe* and *McGee*, it has not been removed from its hinges. *Dooly* v. *Payne*, 326 F.2d 941, 943 (5th Cir. 1964). To suggest, as did the Supreme Judicial Court, that defendant has the option of refusing to deal with out-of-state assignees is to offer defendant a Hobson's choice. The insured has a right to

assign the contract unless the policy provides otherwise. 16 Couch on Insurance 2d §63:16 (1966); *Olmsted* v. *Keyes*, 85 N.Y. 593 (1881). No insurance contract could be sold with a provision prohibiting assignment to persons resident in (or who may in the future become resident in) another state. In any event it cannot be argued reasonably that the issuance of a policy of life insurance without such a restriction is an act by which the insurer exercises the privilege of doing business in all of the fifty states.

If we are right in the foregoing, it can make no difference that defendant registered the assignment on its books and had the kind of communications with plaintiff that an insurance company normally has with the assignee of one of its policies. Defendant did not by those acts exercise any privilege of doing business in Massachusetts but simply recognized the *fait accompli* of the assignment.

The activities of the insurer in the forum state are not the only factor which enters into the determination whether assumption of jurisdiction is fair and just. The facilities of the parties for conducting litigation in the two possible forums are also relevant. See *McGee* v. *International Life Ins. Co.*, *supra*, 355 U.S. at 223, 224. The interest of the forum state and the fairness of trial there are the bases for the jurisdiction. *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1 (1965). The latter element has been aptly referred to as the "balance of conveniences of the parties in conducting the lawsuit in a given forum." *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695, 697 (2d Cir. 1963); *Hutchinson* v. *Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930). In the case at Bar, those factors decidedly point to a New York forum. The witnesses and evidence are there located, and plaintiff cannot argue that

he will suffer any hardship if he has to pursue his remedy in New York:

(1) The application was made in New York (Ex. 1, p. 1).

(2) The medical examination took place in New York (Ex. 1, p. 2). Dr. Arthur Hecht, the examining physician, who may be an important medical witness at the trial, has his office in New York. (*Ibid.*).

(3) The insured died in New York. (Exh. "J" to Exh. "2").

(4) The certificate of death was executed in New York and filed with the Bureau of Records and Statistics in the Department of Health of the City of New York. (*Ibid*).

(5) The proof of death was dated in New York and signed by plaintiff in New York. (*Ibid.*). The claim was presented to defendant by plaintiff's New York counsel. (Covering letter, *ibid.*).

(6) The policy was issued in New York. (R. 7).

(7) Because the contract sued on here was made in New York, the effect of Stricker's representations in his application is governed by New York Insurance Law, § 149. *West Side Motor Express, Inc.* v. *Finance Discount Corp.*, 340 Mass. 669, 671 (1960).

For the foregoing reasons, the Court should conclude that the Court has jurisdiction and that a substantial

question is presented requiring plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

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APPENDIX

Opinion of the Supreme Judicial Court

WHITTEMORE, *J.* This is an action by a Massachusetts resident as an assignee of a policy of insurance issued by the defendant (Modern Life), a New York corporation, on the life of John R. Stricker, a resident of Maryland, who died in New York on February 10, 1965. The stated beneficiary of the policy was the estate of the insured.

The action is brought under the Unauthorized Insurers' Process Act, G. L. c. 175B which, in § 2(a), provides, "Any of the following acts in this commonwealth, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this commonwealth or to corporations authorized to do business therein; (2) the solicitation of applications for such contracts; (3) the collection of premiums, membership fees, assessments or other considerations for such contracts; or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this commonwealth upon such insurer."

The defendant in an "Answer in Abatement and Plea to the Jurisdiction" set up that it has never been present or done business in Massachusetts, nor engaged in any of the activities enumerated in G. L. c. 175B, § 2. After a hearing

on the plea, the judge made findings and overruled the plea. He found that activities of the defendant in respect of the policy in suit brought the defendant under G. L. c. 175B. The issue is here on his report as to the rightness of his findings and rulings.

Most of the facts are not in dispute. Modern Life was incorporated in New York in 1962 and has had an office there ever since. Stricker, on March 18, 1964, applied in New York City to Modern Life for a life policy in the amount of $50,000, and submitted there to a medical examination. The application was filed through an insurance broker, Alfred Sacks. Modern Life issued policy 001942 in New York City and delivered it to Stricker in New York City "through Al Sacks." Shortly thereafter Stricker asked Sacks for assignment and policy change forms and these were delivered by Sacks to Stricker in New York City.

On March 26, 1964, Stricker met with the plaintiff, Wolfman, in Wolfman's office in Boston bringing with him policy 001942. Wolfman's business was investments. During the meeting Wolfman telephoned Modern Life and spoke with Albert Sterlini, its manager of underwriting.

Wolfman testified as follows, much of his testimony being corroborated by Sterlini. Wolfman told Sterlini he understood that a $35,000 policy was in process of being issued to replace the $50,000 policy. Sterlini replied that he was aware of the entire transaction and that a policy of $35,000 was in process. Wolfman told Sterlini he was going to take an absolute assignment of the $35,000 policy and wanted to know what policy number to insert in the assignment forms. Sterlini told him the new policy would have the same number. Being asked what else would be required, Sterlini told Wolfman that Stricker should execute the policy change request to reduce the policy amount to

$35,000 and that Wolfman should return the $50,000 policy to Sterlini. Wolfman asked to have the new policy mailed to him, and Sterlini said he would try to mail it directly to Wolfman's office that day. Wolfman said that as the owner of the policy he intended to pay the premiums and asked the amount of the first quarterly premium. At Sterlini's suggestion Wolfman called again in a short time and Sterlini informed him of the exact amount of that premium.

Also on March 26, 1964, Wolfman wrote Sterlini enclosing the policy, the policy change request, the assignment, and his check for $321.41 as the initial quarterly premium. The letter stated his understanding that the policy would be mailed directly to him and would be in effect immediately upon receipt of the enclosed premium payment. It asked Modern Life to mail to him a receipt for the payment, and to note in its records that Wolfman was the absolute assignee of policy 001942 "and then return the original to me duly endorsed"; and also to note that duplicate premium notices should be sent to him, as he proposed to pay all future premiums.

Under date of March 30 Sterlini wrote Wolfman. The letter acknowledged the check, enclosed a copy of the policy change request and the assignment, and stated, "We have also noted in our files in accordance with the instructions in your letter of March 25. Should you have any questions, don't hesitate to call us." Wolfman received the policy under separate cover. Sterlini testified that he mailed the $35,000 policy to Sacks, "our agent."

Wolfman wrote Modern Life on April 17, 1964, stating that he would like to prepay premiums through June 28, 1966, and asking what the figure would be and if the check should be mailed to the home office. He wrote again on April 27 asking for a reply to the April 17 letter. On May

1, 1964, Sterlini wrote Wolfman that the company's compound discount tables were applicable to annual premiums paid in advance with the initial annual premium. "Therefore, please have the enclosed policy change requests for a change from quarterly to an annual mode signed. To provide coverage through June 1966, the new premium will be paid annually from July 1, 1964. We will discount the two annual premiums if payment is received before June 1, 1964. The two years premium payable in advance will be: $2,418.01."

On May 5 Wolfman, from Boston, mailed to Modern Life, attention of Sterlini, his check for the premium and also the policy change document which had been executed by Stricker in New York. On May 13, 1964, Modern Life's accounting department mailed a "Memo" to Wolfman acknowledging receipt of the advance premium and stating that the premiums on the policy were paid through July 1, 1966. The two premium checks were drawn on and collected from a Boston bank.

Wolfman, in New York, on March 2, 1965, executed and, through an attorney, mailed to the defendant, proof of loss and a certificate showing Stricker's death.

Each policy provided, "This policy shall not take effect until it has been delivered and the first premium paid during the lifetime of the Insured, except as otherwise provided in the receipt with the same number as the application." There having been no premium paid prior to Wolfman's payment of March 26, 1964, no policy became an effective contract prior to that date nor otherwise than in accordance with the provision quoted above. The policies also provided that no assignment would be recognized until duly filed at the home office of the company and that "An assignment . . . shall operate to the extent thereof to trans-

fer the interest of any Beneficiary whom the assignor has the right to change, and to render proceeds to which the assignee is entitled payable in one sum. . . ."

The judge found that Modern Life, acting through Sterlini, "caused to be delivered to the plaintiff as owner and beneficiary in Boston, Massachusetts, a $35,000 policy . . . (replacing a $50,000 policy . . . originally issued and returned by the plaintiff) covering the life of . . . Stricker of . . . Maryland." He found the other relevant facts substantially as stated above, and that the "defendant did not otherwise do business in Massachusetts."

The Applicability of the Statute Apart From the Constitutional Issue.

1. The ruling was right that Wolfman is a "beneficiary" within the meaning of c. 175B. Many contracts of insurance have no stated beneficiaries as do life policies. Under some such contracts, persons not named, or specified by category as persons having rights under policies, do have rights directly against the insurer. See, for example, G. L. c. 214, § 3, cl. (10), providing that the holder of a judgment based on injury or death or property damage may recover in equity from the insurer of the defendant. A lower court in New York has held that such persons are beneficiaries of the policy for the purposes of a statute like c. 175B, that is, § 59-a of the Insurance Law. *Kaye* v. *John Doe,* 204 Misc. (N. Y.) 719, 724-725 (motion to vacate service denied). The reasoning is persuasive. The trial judge said: "[T]he judgment creditors . . . are not mere strangers . . . . [A]s the injured persons, they are within one of the two classes of those distinctly intended and desired to be protected by the statute . . . . True, a beneficiary is usually named by

the assured in certain types of policies . . . . But section 59-a is not in any way expressly restricted to life or fire insurance contracts, and there is no reason or justification for my imposing such a limitation." Compare *Kennedy* v. *Long Island R.R.* 24 F. R. D. 589 (persons who are neither third-party beneficiaries nor holders of matured claims against the insurer are not beneficiaries nor "insureds"). Compare also *Meridian Trading Corp.* v. *National Auto. & Cas. Ins. Co.* 45 Misc. 2d (N. Y.) 847 (assignee of a first mortgage, but not of the policy, having no right to sue on the policy, is not a beneficiary under § 59-a of the New York Insurance Law merely because the policy originally named as "loss payee" a prior first mortgagee).

Wolfman, being an assignee of the policy by virtue of G. L. c. 231, § 5, had, at the time of its delivery, the right to sue thereon.[1] He had from and after its issuance a substantive beneficial interest under the contract. The policy itself, in providing that the assignment transferred the interest of the "Beneficiary," recognized that in an important respect Wolfman moved into the beneficiary's position. Wolfman's independent right to recover the proceeds gave him status as a person within the scope of c. 175B. It cannot be said that all resident assignees are so surely beyond the interest of the State that the long arm statute should be construed to exclude them. It is unimportant whether Stricker, the assignor, could have sued in Massachusetts in any circumstances.

2. The acts done in Massachusetts brought Modern Life within the terms of the statute as written. Evidence that

[1] This right by the statute is subject "to all defences and rights of counter-claim, recoupment or set-off to which the defendant would have been entitled had the action been brought in the name of the assignor. . . ."

the judge could have accepted supports the conclusion that Modern Life caused the policy to be delivered in Boston. Wolfman had a right to delivery of the policy and had requested it. Sterlini for Modern Life undertook to make such delivery. The judge was not obliged to believe that the policy was delivered through Sacks.

A finding that Modern Life did mail the policy to Sacks would not require a different conclusion. Sacks unquestionably was Stricker's agent in soliciting the original policy. See New York Insurance Law, §§ 111, 119, 121; *Bohlinger* v. *Zanger*, 306 N. Y. 228, 231-232. We assume that Modern Life may have sent the policy to the broker in accordance with an established practice, thus informing him of the accrual of his right to a commission. We assume also that had Stricker then had a right to receive the policy, delivery to the soliciting broker would have been delivery to him. But Stricker, after the changes of March 26, 1964, had no right to possession of the policy. Although delivery of the policy was required to make it effective, the requirement was not of delivery to the insured. As no statute or contract required delivery other than to Wolfman, and as, according to evidence, Modern Life had undertaken to deliver the policy to Wolfman, there is no reason to disregard the testimony of Sterlini that the mailing to Sacks was to "our agent." The inference is inescapable that if there was a mailing to Sacks it was with instructions to mail the policy to Wolfman.

In addition to delivering a contract of insurance to a Massachusetts resident, the insurer engaged in the "transaction of [other] business" here by mail and telephone. Sterlini's telephone conversations and letters, informing the owner of the policy of the premiums that would be due (resulting in the receipt of premiums mailed in Boston)

and arranging for a change in the policy terms as to premium payments, as well as the delivery of Wolfman's copy of the assignment, are acts of business. In *Schutt* v. *Commercial Travelers Mut. Acc. Assn.* 229 F. 2d 158, 161 (2d Cir.), cert. den. 351 U. S. 940, the court held that the defendant's mailing of premium notices to Tennessee, receipt therefrom of premium payments, and the submission of proofs of death constituted doing business within the scope of a comparable Tennessee statute. The court said, "The company is at one end or the other of each of these activities . . . ." In *Zacharakis* v. *Bunker Hill Mut. Ins. Co.* 281 App. Div. (N. Y.) 487, 490 (leave to appeal granted, May, 1953, 281 App. Div. 1019), the court said: "When the defendant [in Pennsylvania] mailed its contract of insurance issued to a resident of New York, addressed to a New York broker; when it collected a premium for this policy by mail, sent from New York; and when by its manager it entered into correspondence as to the terms and conditions of the policy moving by mail in and out of New York, it came literally, we think, within the terms of the statute [Insurance Law, § 59-a] by which it constituted the Superintendent of Insurance its agent to receive process." Accord, *Dauphin Deposit Trust Co.* v. *Commercial Travelers Mut. Acc. Assn. of America*, 8 Misc. 2d (N. Y.) 210 (affd. 5 App. Div. 2d [N. Y.] 960). See also *McGee* v. *International Life Ins. Co.* 355 U. S. 220; *Aero Associates, Inc.* v. *La Metropolitana*, 183 F. Supp. 357 (S. D. N. Y.); *Ross* v. *American Income Life Ins. Co.* 232 S. C. 433; *Security Natl. Life Ins. Co.* v. *Washington* (D.C. Mun. App.) 113 Atl. 2d 749; *United States Liab. Ins. Co.* v. *Handy* (D.C. Mun. App.) 173 Atl. 2d 208, 209.

The statute does not require dealings in the State with more than one person. It specifies "Any of the following

acts in this commonwealth." We agree with the *Zacharakis* and *Aero Associates* cases, *supra*, in their holdings on this point under a like statute. The *Ross, Security Nat. Life* and *Handy* cases, *supra*, point the same way although the statutes are, in terms, more specifically applicable to acts related to only one policy.

Modern Life lays stress on the involuntary nature of its transaction with Wolfman and the distinction that, in the cases cited above, the insurer's dealing was with the insured and hence to its advantage in promoting its business. In our view, this distinction does not affect the literal applicability of the statute. We consider this aspect of the facts, however, in its bearing on the constitutionality of the statute as applied to Modern Life.

The Requirements of Due Process.

3. The requirement for the validity of the asserted power of a State to enter a binding judgment against a nonresident not served with process within its boundaries is that "he have certain minimum contacts with . . . [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[1]" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316. *McGee* v. *International Life Ins. Co.* 355 U. S. 220, 222. In *Hanson* v. *Denckla*, 357 U. S. 235, 253, where the issue was jurisdiction over a trust, the court said, with citation of the *International Shoe* case: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Mr. Justice Goldberg (in denying an applica-

[1] *Milliken* v. *Meyer*, 311 U. S. 457, 463.

tion for a stay in *Rosenblatt* v. *American Cyanamid Co.* 86 S. Ct. 1, 4) referred to The Growth of the Long Arm, 1963 U. of Ill. L. F., 533, 549, saying "[David P.] Currie has interpreted and generalized the Hanson test as a requirement 'that the defendant must have taken voluntary action calculated to have an effect in the forum state.'"

The constitutionality of basing service on multiple activities by mail within the State was established by *Travelers Health Assn.* v. *Virginia ex rel. State Corp. Commn.* 339 U. S. 643. That the requirements of due process are met by such a statute when the only activity in the State relates to the particular policy sued on is settled by the *McGee* case (355 U. S. 220, 222).

Modern Life contends, however, that its activity in Massachusetts not only related to a single policy, but also was involuntary. It suggests that, not having solicited the policy here, nor issued it for a Massachusetts resident, its dealings with Wolfman as assignee were only for Wolfman's accommodation in a business transaction, in connection with which it could not reasonably refuse to coöperate by furnishing the information Wolfman needed and completing for him his acquisition of an interest in the policy. It questions the soundness of the *Zacharakis* case (281 App. Div. [N. Y.] 487), and seeks to distinguish it on the ground that there the policy was delivered to the insured's agent and the correspondence in and out of New York by the Pennsylvania insurer was with the insured or his agent. See also the *McGee* case (355 U. S. 220) (suit by a beneficiary of a certificate of reinsurance issued and mailed by a Texas corporation to the beneficiary's son resident in California); the *Ross* case (232 S. C. 433) (suit by the insured for wrongful cancellation of a policy); the *Aero Associates* case (183 F. Supp. 357) (suit by insurers whose contracts had been

reinsured by the defendants); the *Security Natl. Life* case (113 Atl. 2d 749) (jurisdiction based on the mailing to a beneficiary in Washington, D. C. of a certificate of insurance under a policy delivered in Missouri).

Commentators have noted that only minimal contacts with a State are required for jurisdiction over insurers and have mentioned selling within the State as only one of the factors supporting the decisions. We quote from a note in 73 Harv. L. Rev. 909, 928: "The furthest extension of jurisdiction based on an isolated contract has been in the insurance field. . . . [Certain cases described]. There are several factors present which explain the extended jurisdiction in these cases, although the more extreme results may not appear justifiable on an interest analysis. First, the Supreme Court has long recognized a unique state interest in insurance contracts. Second, in selling the policy to an out-of-state plaintiff the insurance company asserts its ability and willingness to investigate and pay claims within the forum. Finally, litigation is a normal part of the insurance company's business and should be regarded as a cost of making a profit within the forum." See also a note in 22 U. of Chicago L. Rev. 674, 684-685.

These cases and comments show one way in which the requirement of voluntary action with the State may be met. We think, however, that acts other than selling a policy may be voluntary business activity within the rule. Wolfman suggests that Modern Life could have declined to deal at all with Wolfman in Massachusetts. We agree with Modern Life that this would not have been a reasonable way to conduct its business. But this is so because it was doing business in the United States, across State lines, and to require that persons dealing with it come to New York would have adversely affected that business. Modern Life dealt with Wolfman in the way it did because of the way it chose to do

business generally. We rule that this was "purposefully . . . [availing] itself of the privilege of conducting activities within the forum State." The maintenance of the suit in these circumstances "does not offend 'traditional notions of fair play and susbstantial justice.'"

The suggestion of the *Hanson* case may be that the constitutional test of fairness may be met apart from the issue of convenience, provided there is voluntary action within the State. We assume, however, that inconvenience remains a factor to be considered in applying in the particular case the rule of fairness stated in *International Shoe Co.* v. *Washington*, 326 U. S. 310. We think that the inconvenience between a trial in Boston and a trial in New York City is not such as to be determinative.[3]

We recognize that no activity of Modern Life induced Wolfman to acquire his interest in the insurance contract. But he acquired an enforceable right under the policy only because of and in the course of business dealings in Massachusetts. Modern Life took its part in those dealings to serve its own interest in conducting its business appropriately and conveniently for those concerned with its product. This met the test of voluntary, purposeful activity, and to the extent that the test of inconvenience is applicable, such inconvenience as is suggested does not make it unfair to rule that G. L. c. 175B as applied to Modern Life on the facts is constitutional. We rule that it is.

4. A decree is to enter in the Superior Court in accordance with this opinion.

So ordered.

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[3] Although the issue is not presented whether the doctrine of forum non conveniens should be applied, see *Pinson* v. *Potter*, 298 Mass. 109, 114. We note that the facts do not suggest that jurisdiction should be declined on this ground. Compare *Universal Adjustment Corp.* v. *Midland Bank, Ltd. of London*, 281 Mass. 303, 315-316.

Appendix

Findings and Rulings of the Superior Court

1. The court finds that the defendant, a life insurance company of New York City, New York, acting through one Albert A. Sterlini, its registrar, caused to be delivered to the plaintiff as owner and beneficiary in Boston, Massachusetts, a $35,000 policy, Exhibit 5 (replacing a $50,000 policy, Exhibit 4, originally issued and returned by the plaintiff) covering the life of one John R. Stricker of the state of Maryland. Sterlini knew that the plaintiff was taking an assignment of this policy and advised the plaintiff orally (by telephone) that the $35,000 policy would be issued and transferred to him as owner upon the delivery by the plaintiff of (a) a duly executed assignment form from Stricker to the plaintiff, (b) policy change request, and (c) a check from the plaintiff for the first quarter annual premium, all of which were executed in Boston and mailed to the defendant in New York (see Exhibit 6). Subsequently, by agreement with the defendant, the plaintiff effected a change from quarter annual to annual payments of premiums and prepaid the policy through June, 1966 (a two year period in the amount of $2,418.01), the defendant granting a discount for the pre-payment. All premium checks were mailed from Boston and were drawn on and collected from a Boston bank of the plaintiff. The defendant did not otherwise do business in Massachusetts.

2. In view of the foregoing findings of fact, the court finds and rules that the aforesaid several activities engaged in by the defendant, effected by mail, in this Commonwealth (and the several telephone conversations) are sufficient to bring the defendant within the purview of and subject to the provisions of General Laws, Chapter 175B (Unauthorized Insurer's Process Act). The defendant's "Answer in

Abatement and Plea to the Jurisdiction" is "allowed" as to its legal sufficiency; however, since the facts alleged therein have been "disproved" in accordance with the findings of fact hereinbefore set forth, the same is hereby overruled.

The court has not acted upon the plaintiff's request for rulings of law and, in view of the foregoing findings and rulings, the court does not deem it necessary to treat individually the defendant's several requests for rulings.

HARRY KALUS
Justice of the Superior Court

Entered: October 26, 1965.

Supreme Court of the United States.

OCTOBER TERM, 1967.

No.

MODERN LIFE INSURANCE COMPANY,
Appellant,
v.
BERNARD N. WOLFMAN,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM.

Now comes Bernard N. Wolfman and moves to dismiss this appeal or to affirm the judgment of the Supreme Judicial Court of Massachusetts on the grounds that no substantial federal question is presented and the question on which the decision of the Court depends is so unsubstantial as not to need further argument.

Question Presented.

Is the application of the Massachusetts Unauthorized Insurer's Process Act (G.L. c. 175B) to a New York insurer—

(1) who negotiated with appellee a reduction of a life insurance policy on the life of another, replacing a policy on the life of the insured which had never

become effective, and which new policy was assigned to and delivered in Massachusetts to the appellee as absolute owner-beneficiary as a result thereof and which policy from the moment it became effective never belonged to the insured, and

(2) who engaged in other activities in Massachusetts, such as informing the owner of the policy in suit of the premiums that would become due, resulting in the payment of premiums from Boston, and arranging for a change in policy terms as to premium payments, and other activities—

constitutional under the due-process clause of the constitution?

Statement of the Case.

The statement of the case set forth in appellee's jurisdictional statement is incomplete in its summary of the dealings on March 26, 1964, between the appellee, Wolfman, and appellant's registrar, Sterlini, in that it omits reference to the fact that Wolfman telephoned Sterlini on that day and told him that he was very much disturbed that Stricker, the insured, had bought a $50,000 policy and that before proceeding with his business transaction with Stricker he wanted to be assured that a $35,000 policy would be mailed to him in Boston; that he understood a $35,000 policy was in process of being issued to replace the $50,000 policy; that he wanted the policy to be mailed to him; that Sterlini said he would try to mail the policy direct to him (Tr. pp. 46-49); that the first page of the $50,000 policy, and of the $35,000 replacement thereof, by their terms provided: "This policy shall not take effect until it has been delivered and the first premium paid during the lifetime of the in-

sured except as otherwise provided in the receipt with the same number as the application" (Exs. 4, 5).

The appellee's statement of the case as to "other communications" omits reference to the exchange of correspondence relating to a change in policy terms effected after the assignment and relating to a change in the manner of paying premiums (Exs. 11, 12, 9, 13, 14).

The opinion of the Supreme Judicial Court contains a more complete statement of the facts, and reference is hereby made thereto (Jurisd. St., App., pp. 2a-5a).

Argument.

The question presented by this appeal is not substantial, because the facts fall within the ambit of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, and is necessarily foreclosed by the decision of this Court in that case. The instant case involves insurance; the forum state has enacted special legislation (G.L. c. 175B, The Unauthorized Insurer's Process Act, similar to that in *McGee*) to exercise its manifest interest in providing effective redress for citizens who had been injured in an activity that the state treats as exceptional and subjects to special legislation; and there were acts in the forum state by which the insurer purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson* v. *Denckla*, 357 U.S. 235.

1. No Mere Assignee is Involved in This Case.

Appellant argues that jurisdiction could not be conferred on the forum state by the mere removal thereto by an insured from another state, and goes on to contend that "he

cannot create jurisdiction in the other state by removing the contract, alone, to that state, as by assignment" (Jurisd. St., p. 11). Appellant thereby implies that Wolfman, the appellee, is a mere assignee; that it had no control over the assignment of the policy to Wolfman; and that its dealings with Wolfman were those which an insurer usually and necessarily engages in once the policy is assigned. But the instant case does not involve a bare assignee. As we shall demonstrate, we are concerned here with a Massachusetts resident who negotiated with the insurer relative to the policy in suit before it became effective, and to whom the policy when issued was delivered as sole owner and beneficiary, and who, after its delivery, requested and obtained a change in policy terms relating to the payment of premiums.

a. The Contract of Insurance was Delivered in Massachusetts.

G.L. c. 175B, in section 2, bases jurisdiction on—

> "Any of the following acts in this commonwealth, effected by mail or otherwise, by an unauthorized foreign or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this commonwealth . . .; (3) the collection of premiums . . .; or (4) any other transaction of business . . ."

Appellant, in attempting to show that the necessary activities in Massachusetts were absent, concentrates only on the issue of delivery, virtually ignoring its other activities there. In this connection it assumes facts not necessarily proved; namely that delivery was made by appellant's registrar directly to its broker, Sacks, in New York, and states that it had "offered to prove that the

agent delivered the policy to the insured in New York" (*Ibid.* pp. 11, 12). The evidence thus offered was hearsay and was properly excluded (Tr. pp. 8, 10, 11). Moreover, the Massachusetts Supreme Judicial Court, in commenting on the trial Court's finding that the appellant had "caused to be delivered to the plaintiff as owner and beneficiary in Boston, Massachusetts, a $35,000 policy . . .", stated that "The judge was not obliged to believe that the policy was delivered through Sacks" (*Ibid.* App. p. 7a). The Supreme Judicial Court went on to state that "A finding that Modern Life did mail the policy to Sacks would not require a different conclusion. . . ." ". . . Stricker, after the changes of March 26, 1964, had no right to possession of the policy. Although delivery of the policy was required to make it effective, the requirement was not of delivery to the insured. . . . Modern Life had undertaken to deliver to Wolfman, [and] there is no reason to disregard the testimony of Sterlini that the mailing to Sacks was to our agent. The inference is inescapable that . . . it was with instructions to mail the policy to Wolfman" (*Ibid.* App. p. 7a).

Appellant cites *Jones* v. *Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y. Supp. 4, at 7-8 (App. Term, 1st Dept. 1936) as proof that, under the "governing law" of New York, delivery by an insurer of a policy of insurance to its agent after the first premium had been paid and the application has been approved constitutes delivery to the insured (*Ibid.* pp. 11, 12). The governing law on the question of whether the conduct of activities in Massachusetts constituted such an impact upon that state as to subject the insurer to the jurisdiction of its Courts is, of course, to be determined by the laws of Massachusetts. However, *Jones* is good law anywhere—on its facts. The proposition of the *Jones* case is that, in the absence of a contrary intent, there is a presumption that the insured, as owner of the policy,

intended that the policy become effective upon release of same by the insurer after payment of the first premium, whether or not the policy was transmitted in the first instance to the insurer's agent. In the usual case, the question arises because the insured died before physical delivery of the policy to him but after its "delivery" to the agent, and the issue is whether there was delivery to the insured in his lifetime. See cases cited in Couch on Insurance, 2d, § 10:18. In *Jones* the issue was whether New York law applied on the question of a waiver argued for by the plaintiff—which issue rested on the assumption that the policy was delivered in New York by virtue of the mailing of the policy to the insurer's agent. However, mere transmittal of a policy to the insurer's agent does not *ipso facto* constitute "delivery." It is a matter of intent, *Golden* v. *Equitable Life Assur. Soc.*; 293 Mass. 286, 199 N.E. 744. If either the insurer (as by imposing a condition precedent on delivery of the policy to the insured, Couch, *op. cit.*, § 10:18) or the owner of the policy, as here by specific instructions to deliver the policy directly to him which instructions the insurer expressly agreed to comply with, directs that delivery be made only in a specified manner, delivery can become effective only if and when made in accordance with the expressed intent.[1]

2. Appellant's Conduct of Activities in Massachusetts Brought it within the Ambit of the Unauthorized Insurer's Act, G.L. C. 175B.

Appellant argues that "defendant registered the assignment on its books and had the kind of communications

[1] The *Jones* case is also distinguishable in that there the insured was still the owner and entitled to possession of the policy, whereas here, at the time of the purported "delivery" to Sacks for delivery to the insured, the latter was not the owner and not entitled to possession.

with plaintiff that an insurance company normally has with the assignee of one of its policies" (Jurisd. St. p. 15). It thus summarily dismisses its other dealings with Wolfman in Massachusetts. But the events on March 26, 1964, for example, were critical, and cannot be dismissed. The dealings between appellant's registrar, Sterlini, and Wolfman amounted to negotiations between them, not unlike the negotiations *de novo* for a policy of insurance. In Wolfman's discussions with Sterlini, arrangements were made to bring into existence a reduced policy of insurance (the $35,000 policy on Stricker's life), which, from the moment it became effective, would belong to Wolfman as absolute assignee and beneficiary. No policy was in effect when these conversations were initiated on that day. The situation is not different in substance from an original application by Wolfman for a $35,000 policy of insurance on Stricker's life. If there had been no abortive attempt to write a $50,000 policy, and no prior physical examination of Stricker, this is precisely what Wolfman would have been required to do. He was told to adopt the procedure laid down by Sterlini only because the prior "issuance" of the $50,000 policy and because the physical examination of Stricker had already taken place. Wolfman, in legal effect, invited the insurer to issue a $35,000 policy, which would belong to him, and him alone, from the moment it became effective, and such a policy was issued and delivered to him. The case comes squarely within *McGee*.

We must also emphasize that there were other activities by the appellant in Massachusetts. "Sterlini's telephone conversations and letters, informing the owner of the policy of the premiums that would be due (resulting in the receipt of premiums mailed in Boston) and arranging for a change in the policy terms as to premium payments, as well as the delivery of Wolfman's copy of the assignment, are acts of business (*Ibid.* App. pp. 7a, 8a, and cases cited).

3. The Balance of Conveniences do Not Deprive Massachusetts of Jurisdiction.

Appellant develops an elaborate argument that it would be more convenient to try the case in New York. It argues, without proof, that the witnesses and evidence are there located, and that Wolfman cannot prove that he will suffer hardship if he has to pursue his remedy in New York. The question is not whether it would be more convenient to try the case in New York. Rather, it is whether Massachusetts has such an interest in the case, and such power over the appellant, as to have jurisdiction over it so as to compel it to submit to the jurisdiction of its Courts. Appellant cannot complain that it would be more inconvenient to try the case in Boston rather than in New York City, a scant 200 miles away. As is pointed out in 73 Harv. L.R. 909, 928: "Finally, litigation is a normal part of the insurance company's business and should be regarded as a cost of making a profit within the forum." Moreover, the witnesses and evidence as to Stricker's state of health are not only the original examining physician, Hecht, and the doctor who issued the death certificate, but the doctors who would testify to, and other evidence as to, Stricker's actual state of health at the time he applied for insurance and his physical condition and habits between the date of his physical examination and the date of his death. We know, for example, that witnesses from one other state, at least, may be involved, because Stricker was a resident of Maryland at the time he applied for the insurance (Tr. p. 4).

As was stated by the Massachusetts Supreme Judicial Court, "Modern Life took its part in those dealings to serve its own interest in conducting its business appropriately and conveniently for those concerned with its product. This met the test of voluntary, purposeful activity, and to the extent that the test of inconvenience is applica-

ble, such inconvenience as is suggested does not make it unfair to rule that G. L. c. 175B applied to Modern Life on the facts is unconstitutional'' (Jurisd. St. App. p. 12a).

Conclusion.

For the reasons stated, it is respectfully submitted that this motion should be granted and that this appeal should be dismissed, or, in the alternative, that the judgment of the Supreme Judicial Court should be affirmed.

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No. 574 October Term 1967

IN THE

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APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Plaintiff suggests that the appeal should be dismissed for three reasons: (1) that defendant is mistaken as a matter of law in stating that delivery of the policy was made in New York (Motion, pp. 4-6); (2) that defendant and the Supreme Judicial Court were mistaken as a matter of fact in treating the transaction as an assignment (*id.* pp. 6-7); and (3) that the balance of conveniences does not incline toward trial in New York (*id.* pp. 8-9).

(1) The premise of plaintiff's first contention, that defendant delivered the policy in suit in Massachusetts, is that *Jones* v. *Metropolitan Life Insurance Company*, 158 Misc. 466, 286 N.Y. Supp. 4 (App. Term, 1st Dept. 1936), cited in the Jurisdictional Statement (p. 12), does not govern the question since New York law is not applicable. Plaintiff does not cite any authority for that proposition,

and the fact of the matter is that the Supreme Judicial Court, which has the final word on the question what law governs in a Massachusetts action, looked to the law of New York exclusively in deciding the question (Jur. St., p. 7a). The Court's error was its assumption that, once Sacks was conceded to be defendant's agent at the time he received the policy, it followed that transmission of the policy by defendant to him was not "delivery" to plaintiff. *Jones*, which is the law of New York, holds the opposite.

Plaintiff argues alternatively that *Jones* is distinguishable on the ground that plaintiff in the instant case directed that the policy be mailed to him. It is plaintiff's contention that under those circumstances "delivery" can become effective only if and when made in accordance with those directions. The fallacy of plaintiff's argument is immediately apparent. The term "delivery", if it is to have any meaning significant in the process of deciding whether defendant did business in Massachusetts, means such relinquishment of the policy as signifies the intention of the insurer that the contract is to be effective. Such was defendant's intention when it transmitted the policy to Sacks. Sacks was not to process the policy. He had no function other than that of a conduit. The policy was transmitted to him because the transaction had been channelled through him from the outset. We note in passing that plaintiff's assertion (Motion, p. 6 n.) that the delivery to Sacks was "for delivery to the insured" flies in the face of the Supreme Judicial Court's finding quoted, with omissions, at page 5 of plaintiff's brief that "The inference is inescapable that if there was a mailing to Sacks it was with instructions to mail the policy to Wolfman." (Jur. St. p. 7a). In any event, the question of "delivery" is only significant to the extent that it throws light on the ultimate issue before the Court: whether

defendant's actions amounted to an exercise of the privilege of doing business in Massachusetts. Defendant respectfully submits that by no stretch of the imagination can the act by an insurer of transmitting the policy and other papers to the insured's assignee be considered the exercise of the privilege of doing business in the home state of the assignee.

(2) Plaintiff contends, next, that the dealings between plaintiff and defendant were not dealings between an insurer and its insured's assignee. The dealings between plaintiff and defendant, he argues, were "not unlike the negotiations *de novo* for a policy of insurance." (Motion, p. 7). Plaintiff would have it appear that what Wolfman did was to apply for a policy of insurance on Stricker's life from Massachusetts. Plaintiff made the same argument in his brief before the Supreme Judicial Court. Suffice it to say that both the trial court and the Supreme Judicial Court rejected plaintiff's argument out of hand. The Superior Court found that "Sterlini knew that the plaintiff was taking an assignment of this policy . . ." (Jur. St. p. 13a), and the Supreme Judicial Court held that "Wolfman, being an assignee of the policy . . . had . . the right to sue thereon." (*Id.* p. 6a). Far from adopting plaintiff's view that defendant sold the policy to Wolfman, the Court made its ruling in plaintiff's favor on the ground that "We think, however, that acts other than selilng a policy may be voluntary business activity within the rule. . . ." (*Id.* p. 11a).

There is no reason why this Court should consider the facts in a different light, for plaintiff's argument hangs on a very slender thread indeed. It depends entirely on the fortuitous circumstances that, when plaintiff first called defendant, no premium had yet been paid, and, therefore, under the terms of the policy, the contract had not

technically become effective. Plaintiff's point is that defendant could have refused to recognize the assignment and have required plaintiff to start afresh, with a new application for a new policy. The fact of the matter is that defendant did not do so but instead treated plaintiff as the assignee, as did all of the other parties to the transaction. That is the record on which this Court must decide whether the Supreme Judicial Court was justified in holding that defendant exercised the privilege of doing business in Massachusetts.

We feel constrained to point out, finally, that plaintiff commits a serious error when he argues that "in Wolfman's discussion with Sterlini arrangements were made to bring into existence a reduced policy of insurance. . . ." The fact is that Stricker, the insured, had already told defendant, in New York, to reduce the amount of the policy, and, when plaintiff called defendant, the amendment by which the policy was to be reduced was already "in the process of being issued." (Tr. p. 24).

(3) In his third point, plaintiff asserts that there are contacts with Massachusetts which make trial more convenient there than in New York, but plaintiff bases that argument on mere surmise and conjecture. Plaintiff does not point to any support in the record for his assertions (apart from the fact that Stricker was a Maryland resident at the time of the application), and hence the Court cannot consider plaintiff's argument in that respect.

By basing his arguments on a proposition of law which is demonstrably erroneous ((1), *supra*) and upon a view of the facts which is patently untenable ((2), *supra*) and upon surmise and conjecture without support in the record ((3), *supra*), plaintiff, far from making a case for dismissal or affirmance, has made a good case for a summary reversal.

CONCLUSION

The motion should be denied and the Court should summarily reverse the judgment of the Supreme Judicial Court or set down the cause for oral argument.

Respectfully submitted,

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